



September 4, 2008

Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW, TW – A325
Washington, DC 20554

Re: Written Ex Parte Presentation in WT Docket Nos. 07-195 & 04-356

Dear Ms. Dortch:

M2Z Networks (“M2Z”) has consistently cautioned the Commission against embracing incumbent carriers’ calls for ad-hoc and technologically biased interference criteria as the basis of establishing service rules for the AWS-3 band. As M2Z previously noted, the last minute calls for testing by those opposed to the use of AWS-3 for broadband services is an obvious delay tactic sprung upon the Commission as it works to conclude the AWS-3 rulemaking. M2Z has also noted that the use of so-called “empirical” testing as gating criteria for the Commission’s allocations decisions is unprecedented and unnecessary in light of the Commission’s long history.¹ Unfortunately, this particular delay tactic has been effective and helped push back the Commission’s timely consideration of this rulemaking for several months as detailed below.

Nonetheless, we anticipate that that Commission staff’s undertaking this week to conduct an unbiased and technologically neutral review of the testing data submitted into the record by various parties will resolve and finally dissipate the fog caused by the incumbent carriers’ “interference” arguments. M2Z is highly confident that this week’s testing, if performed impartially and consistent with state-of-the-art techniques for analyzing spectral co-existence,² will confirm M2Z’s claim that TDD operations can and should occur in the AWS-3 band without the need for onerous technical limits. If there is any truth in T-Mobile and AT&T’s (as well as other vested interests’) claims that their last minute calls for testing are not aimed at generating unnecessary and anti-competitive delay, these carriers should immediately and unequivocally affirm that they will abide by the Commission’s independent judgment of the test results and cease requesting more delays to this proceeding.

¹ See Letter from Uzoma C. Onyeije, M2Z Networks, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 07-195 and 04-356, (filed June 20, 2008). The substantial record evidence in this proceeding on interference-related issues, including several technical studies, is notable because the Commission has never required that it observe testing prior to establishing service rules for a primary service in *any* spectrum band. This fact underscores that T-Mobile is incorrect when it claims that the record is “incomplete” or that testing is “required” as spectrum is routinely put to use for new consumer services without novel, superfluous and time consuming hurdles being erected essentially on the eve of a decision.

² See e.g. Ofcom (UK), “On the Impact of Interference from TDD Terminal Stations to FDD Terminal Stations in the 2.6 GHz Band” (April 21, 2008) (“Ofcom April 2008 Study”), available at <http://www.ofcom.org.uk/consult/condocs/2ghzregsnotice/tech.pdf>; See also ITU-R M.2113, “Report on sharing studies in the 2500-2690 MHz band between IMT-2000 and fixed broadband wireless access systems including nomadic applications in the same geographical area” (2007).

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THE CALLS FOR TESTING HAVE RESULTED IN MONTHS OF UNNECESSARY DELAY CONTRARY TO THE COMMISSION'S DESIRE FOR QUICK ACTION

This proceeding concerns the fate of a long-fallow band of spectrum that may be used to significantly increase broadband deployment, competition and adoption. Thus, the Commission rightly decided that it would limit the duration of the rulemaking and adopt service rules within nine months of Federal Register publication of the *AWS-3 NPRM*.³ However, parties have demonstrated a desire to keep competition out of the AWS-3 band by consistently seeking to slow down this rulemaking. M2Z offers this concise summary of the relevant chronology:

- The calls for delay in this proceeding started early. Just two months after the *AWS-3 NPRM* was released and a week before the comment deadline, MetroPCS sought (and was denied) a nearly four month delay in the FCC obtaining a complete set of comments.⁴
- Rather than prolong the proceeding, the Commission originally sought to conclude the AWS-3 rulemaking on June 12, 2008. This date was far in advance of its self-imposed deadline of August 14, 2008.
- In the week before the June 2008 Commission Agenda Meeting, MetroPCS and others sought a last minute delay to the resolution of the AWS-3 proceeding citing the need for additional notice and comment period regarding the Commission's proposal to include a 5 MHz block along with AWS-3 in order to address interference concerns raised in the proceeding.⁵ As a result, the AWS-3 item was not included in the June 2008 Commission Agenda Meeting.
- On June 20, 2008, the Commission released the *AWS-3 Further Notice* with a limited pleading cycle commensurate with the long-standing nature of this proceeding and its own publicly stated deadline for its resolution.⁶
- In the week before additional comments to this proceeding were due, T-Mobile sought to delay the timeline set out in the *AWS-3 Further Notice* citing the need to conduct unilateral interference testing.⁷ In response, the *AWS-3 Further Notice* pleading cycle was extended again thereby lengthening the Commission's consideration of this proceeding past the FCC's stated deadline for the AWS-3 item and the statutory timeline established by Section 7 of the Communications Act;

³ See Notice of Proposed Rulemaking, Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band, 22 FCC Rcd 17035 ¶ 4 (2007) ("*AWS NPRM*").

⁴ See Letter of Carl W. Northrop, Counsel for MetroPCS to Marlene H. Dortch, WT Docket 07-195 (Dec. 6, 2007). MetroPCS claimed this delay was necessary to avoid conflict with the anti-collusion rules in effect during Auction 73. However, in the nearly six months that have elapsed since the end of the 700 MHz auction, not a single *ex parte* has been submitted by MetroPCS or any other party to this proceeding that included information that was withheld due to Auction 73.

⁵ See, e.g., Letter of Carl W. Northrop, Counsel for MetroPCS to Marlene H. Dortch, WT Docket 07-195 (June 5, 2008). This time around MetroPCS sought delay based on a claim that the FCC lacked notice to decide the destiny of AWS-2 as part of the AWS-3 proceeding. This request is notable because MetroPCS itself was already on record requesting that the Commission consider AWS-3 and AWS-2 together. See Comments of MetroPCS, WT Docket 07-195 at i, 5-7 (filed Dec. 14, 2007).

⁶ See *Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band; Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz, and 2175-2180 MHz Bands*, WT Docket Nos. 07-195 & 04-356, Further Notice of Proposed Rulemaking, FCC 08-158 (rel. June 20, 2008) ("*AWS-3 Further Notice*").

⁷ See T-Mobile Motion for Extension of Time to File Comments, WT Docket Nos. 07-195 & 04-356 (filed July 1, 2008) (seeking a 90 day extension to file comments). As the Commission is aware, this week's tests will be conducted in a matter of 3 days.

- Following the submission of its *own test data* on July 25, 2008, T-Mobile has continued to press for additional tests without reasonable justification or cause.⁸

In light of the numerous delays in the resolution of this proceeding, the Commission should look with extreme skepticism on any “follow-on” delay requests such as are likely to come after completion of these *open* tests. Such arguments would frustrate the Commission’s goal to “facilitate the introduction of new and innovative wireless broadband services to American consumers as soon as possible.”⁹ Of particular note is that the same technical issues that purportedly justify “testing” have existed since M2Z submitted its license application in May of 2006, and not one party to this proceeding claimed that interference tests must be done: (1) in response the January 2007 acceptance of M2Z’s license application; (2) in their December 2007 comments or January 2008 reply comments to the AWS-3 *NPRM*; or (3) in the four months between the close the original pleading cycle here and the Commission’s announcement that an AWS-3 item was on circulation. Rather, the testing suggestion arose only after it was clear that the Commission was considering establishing a free broadband service in AWS-3.

Pursuant to Section 1.1206(b) of the Commission rules, an electronic copy of this letter is being filed. Please let me know if you have any questions regarding this submission.

Sincerely,


Uzoma C. Onyeije

⁸ Additional testing, however, seems particularly duplicative in light of the fact that T-Mobile claims that it “stands by its tests results. . . .” Letter from Thomas J. Sugrue, T-Mobile USA, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 07-195 & 04-356 (filed August 27, 2008).

⁹ See AWS-3 *NPRM* ¶ 4 (2007). Three distinct reasons have already been given for the FCC to delay this proceeding: (1) Auction 73’s triggering of anti-collusion rules (although no Auction-73-related data has *ever* been submitted since close of the Auction); (2) the “lack of notice” emanating from the Commission’s desire to conclude the years-pending AWS-2 proceeding, and (3) the claimed need to conduct unprecedented interference testing prior to the adoption of service rules for a primary service. M2Z believes that this parade of delay justifications is far from coincidental and may very likely be far from over.